

IRA NAGEL, :
Plaintiff, :
 :
-vs- : Civ. No. 3:03cv2246 (PCD)
 :
THE RESIDENTIAL RESORT, LLC, :
FRANK R. WOOD, :
LINDA BONFIGLIO, and :
STANLEY COHEN, :
Defendants. :

Defendants move to dismiss based on a forum selection clause (“FSC”). For the reasons stated herein, Defendants’ motion is **denied**.

This breach of contract action arises from a dispute regarding the ownership and management of a 120-unit apartment building located at 8 Turtle Creek Lane, East Hartford, Connecticut (the “Property”). Plaintiff alleges that, pursuant to a written agreement (the “Agreement”) with Defendant Residential Resorts, LLC, he has an ownership interest and management responsibilities in the Property. Plaintiff seeks a declaratory judgment against Defendants Wood, Bonfiglio, and Residential Resorts (Count One), and he alleges breach of contract against Defendants Wood, Bonfiglio, and Residential Resorts (Count Two), aiding and abetting breach of contract against Defendant Cohen (Count Three), and tortious interference with contractual relations against Defendant Cohen (Count Four).

¹ Only the facts relevant to this motion are recited.

Plaintiff alleges that the Agreement was executed on July 31, 2003, and amended on September 5, 2003. At issue in Defendants' motion to dismiss is a FSC in the Agreement.

Section 5.7 of the Agreement provides that

Governing Law. This agreement shall be governed and construed in accordance with the laws of the State of Connecticut, regardless of the laws that might be applicable under principles of conflict of law. Each Party consents to the jurisdiction of the courts of the State of Connecticut to determine any action or claim for damages, injunctive relief or other relief arising under this agreement.

Defendants move to dismiss, arguing that the FSC vests mandatory and exclusive jurisdiction in the Connecticut state courts.

II. Standard

Motions to dismiss pursuant to FSCs are properly characterized as based on FED. R. CIV. P. 12(b)(6). *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 508 n.6 (2d Cir. 1998) (citing *Lambert v. Kysar*, 983 F.2d 1110, 1112 n.1 (1st Cir. 1993)) (Rule 12(b)(6) is the proper "procedural vehicle for urging dismissal under [a] forum selection clause").

A motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) is properly granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001) (internal quotation marks omitted). A motion to dismiss must be decided on the facts as alleged in the complaint. *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 186 (2d Cir. 2001). All allegations are assumed to be true and are considered in a light most favorable to the non-movant. *Manning v. Util. Mut. Ins. Co.*, 254 F.3d 387, 390 n.1 (2d Cir. 2001). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." *United States v. Yale-New Haven Hosp.*, 727 F. Supp. 784, 786 (D.

Conn. 1990). In its review of a 12(b)(6) motion to dismiss, a court may consider “only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken.” *Samuels v. Air Transport Local 504*, 992 F.2d 12, 15 (2d Cir. 1993).

III. Discussion

Defendants argue that the Agreement’s FSC is mandatory and places exclusive jurisdiction in the Connecticut state courts. Def. Mem. at 5. Plaintiff responds that the FSC is permissive and does not preclude jurisdiction in other courts. Pl. Opp. at 1.

A. Mandatory and Permissive Forum Selection Clauses

FSCs generally are classified as mandatory or permissive. A mandatory FSC grants exclusive jurisdiction to a selected forum. A permissive FSC, sometimes referred to as a consent-to-jurisdiction clause, only reflects the contracting parties’ consent to resolve disputes in a certain forum, but does not require that disputes be resolved in that forum. *See John Boutari and Son, Wines and Spirits, S.A., v. Attiki Imps. and Distribs. Inc.*, 22 F.3d 51, 52-53 (2d Cir. 1994).

B. Analysis

As noted above, the FSC here provides that “each Party consents to the jurisdiction of the courts of the State of Connecticut to determine any action or claim for damages, injunctive relief or other relief arising under this agreement.” Agreement, §5.7. Defendants argue (1) that the FSC is unambiguous, mandatory, and exclusive, Def. Mem. at 6, and (2) that if the FSC is ambiguous such ambiguity should be construed against Plaintiff, who drafted it, Def. Reply at 3-7. Plaintiff contends that the FSC is a permissive consent-to-jurisdiction clause.

The FSC is not ambiguous as there is no language providing that Connecticut state courts shall have exclusive jurisdiction. *See Dunne v. Libbra*, 330 F.3d 1062, 1064 (8th Cir. 2003)

(“With no plain language basis to support a finding of exclusivity, we do not view the forum selection clause as ambiguous”). The majority of courts considering the issue have held that absent clear language of exclusive jurisdiction, an FSC is permissive. *See e.g. Boutari*, 22 F.3d at 52 (“The general rule in cases containing forum selection clauses is that when only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties’ intent to make jurisdiction exclusive”) (internal quotation omitted); *Blanco v. Banco Indus. De Venezuela, S.A.*, 997 F.2d 974, 979 (2d Cir. 1993) (finding FSC to be “a permissive consent-to-jurisdiction provision, and not a mandatory and exclusive forum selection clause. . . . because of the nonmandatory words the parties chose to express their agreement”); *John’s Insulation, Inc. v. Siska Constr. Co.*, 671 F. Supp. 289, 295 (S.D.N.Y. 1987) (“A consent to jurisdiction clause is a typical example of a permissive forum selection clause,” which “merely empowers a court to hear a particular case, but it does not require that the case be heard in the particular forum”) (internal citations omitted); *K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 314 F.3d 494, 500 (10th Cir. 2002) (finding an FSC to be permissive in the absence of exclusive terms such as “exclusive,” “sole,” or “only”); *E’Cal Corp. v. Office Max, Inc.*, 2001 U.S. Dist. LEXIS 15868, at *6-*10 (E.D. Pa. Sept. 6, 2001) (finding language identical to the language of §5.7 of the Agreement to be permissive).

The cases Defendants cite to support their argument that the FSC is mandatory are not convincing. For example, they argue that *Cronin v. Family Education Co.*, 105 F. Supp. 2d 136 (E.D.N.Y. 2000) supports their position, but the FSC in *Cronin* clearly provided that “[i]n the event of any dispute under this Agreement, the parties agree to the *exclusive* jurisdiction of the courts located in the City and State of New York.” *Cronin*, 105 F. Supp. at 137 (emphasis added). In contrast, the FSC at issue here contains no such language of exclusivity. Defendants’

claim that *Cent. National-Gottesman, Inc. v. M.V. Gertrude Oldendorff*, 204 F. Supp. 2d 675 (S.D.N.Y. 2002) supports their argument is also misplaced. In *Cent. National Gottesman*, the clause provided that “[a]ny disputes under the Bill of Lading to be decided in London according to English Law.” *Cent. National Gottesman*, 204 F. Supp. 2d at 678. Finding the clause to be mandatory, the court noted that “rather than simply stating that the court in London shall have jurisdiction over all disputes, [the language] actually makes explicit that such disputes are to be resolved in that forum and nowhere else.” *Id.* In contrast, here the FSC merely reflects that the parties agree that Connecticut state courts are an appropriate forum, but not the exclusive forum, to bring any dispute arising under the Agreement. Unlike in *Cent. National Gottesman*, here the FSC does not say that any disputes are to be decided in a specified court. Instead, the plain language provides that the parties agree that Connecticut state courts are an appropriate forum in which a dispute may, but not must, be brought.²

Here, while the parties agree that Connecticut law “shall” govern any disputes and consent to jurisdiction of Connecticut state courts, there is no clear language indicating that sole and exclusive jurisdiction lies *only* in Connecticut state courts. The parties clearly agree that Connecticut state courts are one appropriate forum, but the plain language does not foreclose

² Defendants’ argument that “[i]n *TUC Electronics, Inc. v. Eagle Telephonics, Inc.*, 698 F. Supp. 35 (D. Conn. 1998), [this Court] considered nearly identical language in enforcing a forum selection clause and in dismissing the federal action” is devoid of any merit. *See* Def. Mem. at 6. The FSC in *TUC Electronics* provided that

Any dispute, controversy or claim arising out of, in connection with or in relation to this Purchase Order, its interpretation, construction, formation, performance or breach (except defective pricing referred to below) *shall* be submitted to and determined by the appropriate court of original jurisdiction of the State of New York.

TUC Electronics, 698 F. Supp. at 37 (emphasis added). The clause was found to “mandate[] that disputes be submitted to ‘a court of original jurisdiction of the State of New York.’” *Id.* at 39. The issue was whether the phrase “of the State of New York” referred to federal courts and state courts, or solely to state courts. *Id.* The consent-to-jurisdiction clause in the present case is far from “nearly identical” to the FSC in *TUC Electronics*.

litigation in other courts. Such consent to state court does not preclude the action from being litigated in another court.

The FSC is a permissive consent-to-jurisdiction provision rather than a mandatory exclusive FSC. Because the FSC does not require litigation of this dispute in Connecticut state courts, Defendants' motion to dismiss pursuant to the FSC is **denied**.

IV. Conclusion

For the reasons stated herein, Defendants' motion to dismiss [Doc. No. 29] is **denied**.

It is hereby **ORDERED** that Defendants' opposition to Plaintiff's motion for preliminary injunction shall be filed on or before February 10, 2004. Plaintiff's response, should he wish to file one, shall be filed on or before February 12, 2004.³ All such filings shall be compliant with the Supplemental Order [Doc. No. 3]. A hearing on the preliminary injunction shall be held at 10:30 on February 13, 2004.

SO ORDERED.

Dated at New Haven, Connecticut, February __, 2004.

Peter C. Dorsey
Senior United States District Judge

³ Both parties shall submit a courtesy copy of their memoranda to Chambers on or before the due dates.